

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENDA L. CUMMINGS,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 184289

Mason Circuit Court

LC No. 94-001289-FC

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions by jury of second-degree murder, MCL 750.317; MSA 28.549, and second-degree child abuse, MCL 750.136(B)(3); MSA 28.331(2). The trial court sentenced defendant to fifteen to thirty years' imprisonment for the murder conviction, and to two years, eight months to four years' imprisonment for the child abuse conviction. We affirm.

I

Defendant's first claim is that there was insufficient evidence presented for a rational trier of fact to have found that the essential elements of the crime were proven beyond a reasonable doubt. We disagree. Viewing the evidence in the light most favorable to the prosecution, the evidence of intent was sufficient for a rational trier of fact to conclude that defendant possessed the requisite intent at the time that she gave her twin children an overdose of medication. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). An insufficient evidence claim "focuses on whether the evidence, taken as a whole, justifies submitting the case to the trier of fact or requires judgment as a matter of law." *People v Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988). The only disputed element of second-degree murder in this case was whether defendant had one of three requisite states of mind that will constitute malice: an intent to kill; an intent to do great bodily harm; or the knowing creation of a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of her actions. *People v Dykhouse*, 418 Mich 488, 508-509; 345 NW2d 150 (1984); CJI2d 16.5.

Defendant argues that the prosecutor presented insufficient evidence of intent for a rational jury to find defendant guilty beyond a reasonable doubt because there was no direct evidence of defendant's state of mind. This Court has held that intent may be inferred, nonexclusively, from (1) the previous relationship of the parties; (2) the defendant's actions prior to the killing; (3) the circumstances of the killing itself; (4) the defendant's conduct after the killing; and (5) the weapons used. *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987); *People v Kvam*, 160 Mich App 189, 193; 408 NW2d 71 (1987). In this case, evidence was admitted showing that defendant knew of the lethal effects of Doxepin and had been warned of them repeatedly; that she had significant trouble managing her daughters and had given them up to another caregiver who got much better results; that she seemed uncaring toward her daughters at times and made statements about getting rid of them; that the difference in size between a dropper and the medicine spoon was extreme, as was the amount of liquid administered to the children; that even one of the children noticed that she was being given a larger amount of medicine than usual; that defendant did not act upset after the overdose and made statements about the amount given that were not completely consistent; and that she seemed more concerned about a possible lawsuit after the overdoses than her daughters. Although there was no direct evidence of defendant's intent, as is common, there was sufficient evidence for a reasonable jury to infer from the surrounding facts that defendant had the required intent to commit second-degree murder.

II

Next, defendant contends that her sentence was disproportionate. We disagree. Defendant's sentence was within and at the lowest end of the recommended range of the sentencing guidelines as scored by the trial court. It was therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not overcome that presumption, and we are not persuaded that the sentence was an abuse of discretion. *People v Coles*, 417 Mich 523, 537; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

III

Finally, defendant argues that the trial court abused its discretion by allowing a demonstration of the difference between ninety milligrams administered from a medicine dropper, and ninety milliliters administered from a medicine spoon because the demonstration was not substantially similar to the circumstances of the actual overdose since defendant did not get the opportunity to see the medicine accumulate in a glass or to compare the amounts. The trial court must determine whether a model or demonstration is a fair representation of the ultimate fact, but if the correctness is disputed, the court may allow the demonstration and submit the question to the jury. *Finch v WR Roach Co*, 295 Mich 589, 596; 295 NW 324 (1940). This Court has held that "any minor differences go to the weight placed on the evidence by the jury and not to the admissibility," and that as long as any inaccuracies were raised in the presence of the jury, there was no abuse of discretion in using a model to assist the jury, in comparison to actually admitting

it into evidence. *People v Ng*, 156 Mich App 779, 788; 402 NW2d 500 (1986); *Haynes v Monroe Plumbing & Heating Co*, 48 Mich App 707, 714; 211 NW2d 88 (1973). In this case, the demonstration was not an exact replica of the circumstances of the overdose, but it was not meant to be and the differences were explained to the jury during the demonstration. The demonstration had a legitimate purpose in assisting the jury in determining defendant's intent and the lethal nature of the large amount of medication. Therefore, there was no abuse of discretion.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Joel P. Hoekstra